IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 04-10-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL ORIGINAL PETITION No.25029 OF 2007

M.Ravikumar ... Petitioner

-vs-

A.Arul ... Respondent

Petition under Section 482 of the Code of Criminal Procedure.

For petitioner : Mr.S.Sathya Chandran
For respondent : Mr.A.Shivkumar

O R D E R

This petition has been filed to call for the records pertaining to C.C.No.143 of 2007, pending on the file of Judicial Magistrate No.II, Poonamallee, and quash the same.

2. Petitioner is accused in the said calendar case. Respondent lodged a complaint under Section 138 read with 142 of The Negotiable Instruments Act with the said Court, on the strength of a cheque, allegedly delivered by the petitioner. After fulfilment of legal formalities as to issuance of notices, the respondent filed the complaint, since the cheque was dishonoured on the ground "funds insufficient".

3. In the complaint, it is stated that since the complainant was suffering from viral fever and was taking treatment, having been advised to take bed rest, there was a delay of three days in filing the complaint. The complaint was accompanied by a medical certificate to that effect, but, the list of documents in the complaint does not show the presence of the said medical certificate. The complaint was signed by the complainant and the docket order of the Court, dated 28.02.2007, goes to the effect "complainant present; his sworn statement and proof affidavit recorded; prima facie offence under Section 138 NI Act made out. Issue fresh summons to accused on payment of process fee. Call on 04.04.2007."

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4. The main grievance of the petitioner is that no notice was issued to him before condoning the delay in complying with the statutory requirements and failure on the part of the complainant to file necessary petition and affidavit and requesting the Court to condone the delay is illegal. It is his further outcry that the learned Judicial Magistrate has not passed any speaking order as to the condonation of delay and the order of taking congnizance of the matter goes as if the delay was condoned. In short, the order of cognizance is bereft of specific mentioning of condoning the delay.

5. The complainant has filed a counter, stating that the delay of three days has been mentioned in the complaint and the trial Court, presumably, after considering and being satisfied with the proviso as required under Section 142 (b) of The Negotiable Instruments Act, took cognizance of the offence and the law does not contemplate notice to the accused, in the matter of condonation of delay. In other words, the contention of the learned counsel for the respondent is that the law does not prescribe any procedure to issue notice to the accused, in this regard.

6. Learned counsel for the petitioner would draw attention of this Court to a decision of this Court in R.Kanthimathi and two others v. Bank of India, 2007 (4) CTC 524, wherein it is observed that though the petition to condone the delay is filed and if it is not supported by an affidavit along with the complaint, of course, it is a curable defect, but the affidavit must be filed and the question of condoning the delay should be decided after affording sufficient opportunity to the accused.

7. In State of M.P. v. Pradeep Kumar, 2000 (4) CTC 434, the Hon'ble Supreme Court has observed that if a second appeal is filed under Order 41, Rule 3-A of C.P.C., when there is a delay and appeal memorandum is presented not accompanied by a petition to condone the delay, the duty of the Court is to return the memorandum of appeal as defective and necessary application for condonation of delay shall be required.

8. In Prashant Goel v. State and Another, 2007 (1) Crimes 78, the Delhi High Court rendered a finding that in a time barred complaint on dishonoured cheque, accompanied by a petition for condonation of delay, without issuance of notice to the other side, no order can be passed against a person, which affects his rights. The Delhi High Court discussed the principle audi alteram partem and held that the accused is entitled for notice. It also referred to a much celebrated judgment of the Hon'ble Supreme Court in A.R.Antulay v. R.S.Nayak, 1988 (2) SCC 602, in which it was held that even a decision of the Supreme Court could be impugned on the ground that decision has been taken by the Court without affording to the accused an opportunity of being heard.

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9. The rules of natural justice are important parameters of the fairness of the procedure. On the face of it and, concedingly, the complaint was woefully time barred, by means of which, the valuable legal right got acquired by the other side and the statutory delay should be dealt with only after notice to the other party and, in the absence of notice to him, it would be a classical violation of principles of natural justice. The observance of principles of natural justice has got much concern and force when they are expected to be followed in judicial proceedings. Fair hearing is the most fundamental principle of administration of justice. It is futile on the part of any party to contend that the common criminal law does not prescribe it. In order to qualify a complaint to be a one to be taken on file and for taking cognizance, it should be free from legal obstacles of time bar. The power of a Judicial Magistrate to condone the delay has been conferred by The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. So, it is the bounden duty of the Magistrate to call for a petition and affidavit as well, for the purpose of deciding the condonation of delay, after serving notice to the accused party. The affidavit should contain the reasons for the delay and the Court should get satisfied with the said reasons to come to a decision for excusing the delay, provided after hearing the other side. In the absence of the above said procedure, if any complaint is taken on file, the principles of natural justice are deemed to have been violated, prejudicing the valuable rights accrued to the other side.

10. In view of the above said observations, it is to be held herein that the time barred complaint, not accompanied by any petition or affidavit for the purpose of condonation of delay, is not maintainable.

11. The next limb of the contention of the learned counsel for the petitioner is that while the Court has taken cognizance of the offence on the strength of a complaint, the subsequent conduct of prosecution by a Power of Attorney without production of original deed and service of notice in that regard to the petitioner, is not maintainable.

12. As far as the production of original deed is concerned, in the counter, the respondent had stated that the trial Court has taken cognizance only after a perusal of the original documents and the said documents were returned on substitution of xerox copies of the same.

13. With regard to the conduct of the case, it is the contention of the petitioner that without his knowledge, the prosecution could not continue.

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14. In the present case, cognizance was already taken as born out from the docket sheet orders, which go to the effect that the complainant was examined and his sworn statement recorded. Hence, there could be no irregularity at the time of taking cognizance, barring the question of limitation. As for the subsequent conduct of the case, the accused would get ample opportunity to agitate the same and it may not form a good ground for quashing the proceedings, pending before the Judicial Magistrate.

15. In view of the discussion made above following the decisions of the Hon'ble Apex Court, I direct the learned Judicial Magistrate No.II, Poonamellee, to call for petition and affidavit in proper form from the complainant, for the purpose of condonation of delay, and, decide the matter on its own merits, after due notice to the accused. Till such time, the complaint shall be kept in abeyance and no proceeding carried out, on the taking of cognizance of the complaint. The fate of the complaint will follow the result in the petition to condone the delay, irrespective of the cognizance taken.

16. Criminal Original Petition is disposed of, in the above terms. Consequently, the connected Criminal M.P.Nos.1 and 2 of 2007 are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dixit

To

1. The Judicial Magistrate No.II,
Poonamallee.

1 cc to Mr.S. Sathia Chandran, Advocate, Sr. 62072
1 cc to Mr.A. Shivakumar, Advocate, sr. 61769

CRL.O.P.No.25029 OF 2007

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